Now the defendants in a case like this, your Honor—and I believe this is the reason for Rule 23—must be permitted to ascertain the basis for these serious charges. There is a tremendous cost to all the shareholders of this corporation, thousands of them, in meeting these grave charges. We have a right to proceed against the plaintiff if, as we respectfully suggest, these charges are without foundation.

Now it is very easy for someone like Mr. Brilliant—and I will come to his affidavit in a minute—it is very easily for someone like Mr. Brilliant to get this poor
65 old lady to come in here and sign this complaint and then say, "I don't know anything about it." She has no knowledge, she doesn't even understand what she signed.

The Court: It might be very easy but very dangerous.

Mr. Block: That is what we say, your Honor.

But this man Brilliant is not before this court. This court cannot impose the sanctions that I suggest this court might well be inclined to impose if Mr. Brilliant were before this court. It is not, as I say, an attempt to strike the allegations of the complaint because they are not true, because we say, the defendants say they are not true; it is because the plaintiff in this case filed a false affidavit when required to swear to the complaint under Rule 23, and the defendants cannot attack the allegations by proving from the affiant their falsity.

* * *

81 Mr. Block: Now, your Honor, if there was ever a reason for Rule 23(b) it is contained in those affidavits

because here are those defendants charged with grave, grave civil wrongs who are denied an opportunity to ask anyone what the basis of those is.

The legal complications, I suggest to this court, that Mr. Brilliant was talking about are those attendant upon bringing a suit without factual basis. The poor old plaintiff dressmaker could take that rap, but that is exactly what Rule 23(b) is designed to prevent. The plaintiff must swear to the complaint and must be prepared to back up the affidavit with some facts.

This plaintiff has not met the requirements of Rule 23(b) and the pleading, your Honor, we suggest is a sham.

• • •

87 The Court: I should like to get your answer to this
88 question, Mr. Friedman: Rule 23(b) says among other things that the complaint shall be verified by oath. Now to me, unless I am shown by competent authority to the contrary, "by oath" means an honest oath. Certainly it doesn't mean that a complaint should be verified by a false oath.

If I am right in my—let's say my inclination to believe that, then we do not have in fact an oath here; we have a signature put to a complaint admitted to be false. False is an ugly word, I am sorry to have to say that to a member of the bar of this court, the lawyers representing the plaintiff, but everything points to the fact that there was a false oath.

I appreciate that a thing can be false without the affiant being really the principal culprit. I appreciate on the record here that some resourceful lawyer, relative by marriage of the plaintiff, induced her to sign it but it seems to me that the preferable way to have gotten this complaint on file, if they wanted this

woman to file this complaint in her name, and she was qualified, had standing, had standing to sue, that Mr.
89 Brilliant, who was himself a substantial stockholder, could have executed the complaint as her duly qualified agent for the purpose, and that would have absolved the plaintiff.

It does occur on occasions that a plaintiff necessarily is a proper party, but does not have knowledge of all of the facts. But if the plaintiff doesn't have knowledge, that plaintiff should not say that he or she does.

Now I want to ask you and other counsel for the defendants whether you have researched the meaning of that. We know what an oath ordinarily means, of course, but it strikes me that those who wrote this rule put the provision in there for an oath so that there would be some responsibility on the part of the plaintiff and not make it a very loose one.

Do you have any opinion about that?

* * *

94 The Court: Unless you can convince me to the contrary, I don't regard the use of the word "sham" in Rule 11—and I concede you as far as I can remember that rule is the only rule in which the word is used—but it strikes me that a pleading can be worse than sham. Sham may turn out to be a very charitable word used in connection with what is apparent to a person reading this complaint and then reading a transcript of the testimony of the plaintiff which has been admitted into evidence here as Defendants' Exhibit 1. I think it is far more serious, and I express no opinion at this particular point as to whether the
95 seriousness of the facts warrant dismissal. I will get to that. But just the use of the word, the simple use

of the word "sham" in Rule 11 doesn't preclude, it seems to me, the court from dismissing a complaint for more serious objections.

Mr. Watt: I am not saying that it does, your Honor. What I am saying is this: As I had understood the motion as it was presented in writing, it was a motion to dismiss on the grounds that the complaint was a sham. In endeavoring to ascertain what is meant by that and in looking in the rules and the cases, the only rule in which a sham pleading is referred to and in which grounds for dismissal are set forth, to my knowledge, is Rule 11.

If I understand Mr. Block's argument, however, in considerable part he is relying on Rule 23(b), stating that on the basis of the deposition of the plaintiff, it is possible to conclude without doubt, as he has argued, that the verification is false and therefore it is the equivalent of no verification at all, and that therefore there may be a dismissal by reason of failure to comply with Rule 23(b).

96 That may be the position that Mr. Block has urged and I say that is a different position from contending that the complaint is sham and false within the meaning of Rule 11 of the Federal Rules of Civil Procedure.

I want to come to the question as to the assertions made by counsel that it is obvious that the verification is false because I don't think it is obvious at all.

* * *

122 Mr. Watt: Secondly, insofar as it is contended that this is a sham pleading, I say to the Court two things:
123 Counsel have complied with requirements of Rule 11 literally, completely, fully, diligently, and honestly, and

I say, so far as concerning the deposition of Mrs. Surowitz, it is not proper on the circumstances of that deposition and the answers given by that woman, to conclude that her verification is false.

What it shows is that this is a woman whose sophistication is minimal. It shows that—

The Court: I don't know what you mean by the word "sophistication" used in a lawsuit.

Mr. Watt: I mean a person who cannot, in the nature of things, by virtue of experience, background, education, and so on, understand the intricacies of Securities Act provisions, to understand the intricacies of corporate financing, to understand the intricacies that are set out in the documents attached to the complaint. Such a person necessarily—

The Court: I accept your definition as what you perceive the word to mean, and I ask you then, because a person is unable to appraise the conduct of parties who she is charging with certain conduct, under oath, does that say that a court may permit that unsophisticated person, as you characterize her, to of record charge individuals with serious misconduct when, as
124 in this case, her son-in-law's affidavit asserts that he is the owner of a substantial number of shares in this corporation?

Now, I am not saying that it was his obligation to make himself a plaintiff in this case, if, indeed, for reasons he thought proper, his mother-in-law was the one to be to blame. But you make so much of the word "sophistication" or lack of it. You used it several times here. You wouldn't have had to use it if Mr. Brilliant was the plaintiff here. I grant you there was no obligation on his part to be the plaintiff.

It seems to me that, in a lawsuit, the fact that a person is illiterate or unsophisticated or having no knowledge of facts doesn't give them the right to file a complaint under oath making such serious charges as are made here. Whether that is the law or not, we will find out.

Mr. Watt: If that person, however untutored, relies on what is told to her by someone in whom she has confidence, and that person tells or informs the plaintiff that, himself, or herself, has done his or her level best to ascertain facts, and relates to the plaintiff what he or she has discovered, then I would say
125 a person could be illiterate and still be justified in relying upon what was told to her, and be in a position in which she could say that she honestly believed certain things.

* * *

126 The Court: Mr. Block, do you care to reply?

Mr. Block: Only one thing, Your Honor.

I think that there are some misunderstandings that Mr. Watt has sought to create, but I don't believe they will be created here.

127 We are not seeking to establish an intelligence test for shareholders; we are seeking to obtain from this Court a ruling that Rule 23(b) must be complied with, that an oath means what it says; that when a plaintiff says, "I know these facts and I have an understanding of these other facts, these facts on which I have information and belief as to those facts," and then is unable to give any information at all as to the basis of those sworn statements, that has not been compliance with Rule 23(b).

* * *

129 The Court: It seems here that the Court must approach the consideration of this motion on the question of whether or not there has been compliance with the provisions of Rule 23(b) of the Federal Rules of Civil Procedure. If there has not been, it is not necessary for the Court to reach the question of whether or not the provisions of Rule 11 have been complied with.

Now, this deposition, Defendants' Exhibit 1 in evidence, indicates that Mrs. Surowitz, who verified the complaint, has personally no information in regard to the allegations of the complaint, allegations which she has sworn are true or that she believes are true.

At page 14 of the deposition, Mrs. Surowitz states that she knows nothing about any of the individual defendants. It is true that she says that she relied upon her son-in-law, Mr. Brilliant, but if it is the law that a person can make the kind of oath required under
130 Rule 23(b), knowing nothing about the facts, I don't think any of the cases cited to me say that is true.

With respect to Mr. Watt's opinion or suggestion about summary judgment, a motion for summary judgment being the proper remedy in respect to matters quite apart from whether or not the record indicates compliance with 23(b), I am inclined to be sympathetic to that position. I don't have to reach it here, however, because I think the complaint, the oath to the complaint, and the language of Rule 23(b), require me to allow this motion to dismiss.

In ordinary circumstances, the rule does not require the Court to make findings of fact and conclusions of law in a motion of this kind. However, since, if this case is reviewed, it would be well for the Court of

Colloquy

Appeals to have before it the findings of the Court and the Court's view of the law. I would suggest that counsel for the defendants prepare a draft order with a preamble reciting language by the Court and findings by the Court, and conclusions of law which justify an order dismissing the complaint.

The order, Mr. Clerk, will be that the motion of the
131 defendants to dismiss this complaint will be allowed.

• • •

133-187 Transcript of hearing on March 27, 1964 containing the argument on proposed findings of fact and order of dismissal. Following are excerpts from that proceeding:

• • •

151 Mr. Watt: I am now addressing myself to finding paragraph 12 at the bottom of page 5 and the top of page 6.

I am wondering how many lawyers would be in a position to explain the significance of a collusive suit under Rule 23(b), and I'll bet there isn't a layman out of ten million that can explain it.

The Court: Oh, that may well be, but that's no excuse for swearing to an allegation if she doesn't understand it. Then you should get somebody to make oath to a complaint who does.

• • •

153 Mr. Watt: I think there has to be established something further here, namely that certain of the facts which are set out are, in fact, false, and that the person had no basis whatsoever for a belief at the time that the statement was made.

The Court: I don't agree with that. The rule says, Rule 23(b), that the complaint must be sworn to. If you swear to allegations that aren't true, that is not a proper oath in my opinion, and that is what I am holding here.

Mr. Watt: I understand, your Honor, but I think
154 it also ought to be clear there are certain allegations in the complaint which she swore to which are indubitably true, namely that she is a stockholder, namely that this is not a collusive suit, namely that she did protest, even though when the question was asked her, she didn't know what the question meant; but the fact is these gentlemen received the letter with her signature, she said it was her signature. How it is possible to say that in those respects her verification is false absolutely escapes me.

Turning over to paragraph 14 on page 6 and subsequent paragraphs, and reading those in light of what was asked of Mrs. Surowitz in the course of her deposition, seems to me very unjust. The questions were in almost every instance couched in legal language. Questions were asked and when she didn't understand it, no effort whatsoever was made to clarify the matter by counsel. No effort was made to break the question down into language which an ordinary layman can understand.

The Court: Did you object to the question?

Mr. Watt: I objected to some of the questions,
155 yes.

The Court: All of them?

Mr. Watt: Not to all of them, no, sir. This was not my deposition. There were no—

The Court: You have a right to participate in it.

Colloquy

Mr. Watt: There were no pleadings on file. There were no motions on file at the time.

* * *

163 Mr. Watt: Paragraph 31 on page 13, there are certain findings there which are used, I take it, for the purpose of suggesting that when Mr. Brilliant decided that his wife should not be a party plaintiff because of her health, that that was somehow or other not a decision which was perfectly proper for the man to make under the circumstances, and when he decided that as a fiduciary he should not sue because there might be some legal complications, that there is something invidious about that. I don't think that those findings have any place here. I don't think there is any justification for their inclusion if the purpose is to suggest that what Mr. Brilliant decided is somehow or other improper.

164 The Court: Those are the allegations in substance of the affidavit, are they not?

Mr. Watt: That is quite right, your Honor, but the effect of that assertion in here, the effect of many other assertions with regard to the affidavits of Mr. Brilliant and Mr. Rockler is to have the court in effect weigh the evidence and construe the affidavit, and I humbly submit to your Honor that the effect of these findings has the court weigh and construe those affidavits and Mrs. Surowitz' deposition in a manner most favorable to the moving party in this case. I think in a motion of this kind, particularly where the affidavits were filed in connection with the role of counsel in a sham complaint motion under Rule 11, those affidavits, absent something else, simply must be taken as representing the facts that they state and that it is not properly the function of the court at this stage of the

proceeding to endeavor to weigh the affidavits or to use them and the deposition of Mrs. Surowitz most favorably to the position asserted by the moving parties.

The Court: The affidavits go, I think, to prove the falsity of the oath of the plaintiff.

165 Mr. Watt: I realize that is the contention which apparently Mr. Block urged in his motion to strike the affidavits. I have not heard him express the specific respects in which the affidavits indicate the falsity of the verification.

There is a statement in here to the effect that the affidavits are deficient in that they do not state matters with regard to Mrs. Surowitz' knowledge. Well, I suppose that is a semantic and I would say almost a philosophical problem.

The Court: It goes beyond mere semantics. Here you tell me in one breath that his wife, Brilliant's wife, who is a stockholder, did not execute the complaint because she was sick. Yet he was willing to put his mother-in-law in who was something approaching illiterate, or at least, to borrow your expression, a person of limited education. I think it is rather important to have that in the record, more especially since Mr. Brilliant was a man of legal education.

Mr. Watt: Turning to the question as to whether the affidavits are in some respect deficient because they

166 do not indicate what Mrs. Surowitz knew on the date that she executed the verification, as I started to say, this is in a sense a philosophic problem. I cannot say nor can any man what was in the mind of a particular person on a particular day on the basis of something I know. I can say what I told him, I can say what I showed him, I can say what I told him I believed, and

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I can tell him the reasons I believed that. But what goes on in a man's mind is something I cannot assert of my knowledge. So to expect the affidavits as counsel apparently do to say on such and such a day Mrs. Surowitz knew A, B, C, D and E, is asking the impossible.

The Court: They don't say that. They take her at her word on her examination under oath that she didn't know anything about it. That is why I ordered the complaint dismissed.

• • •

171 Mr. Watt: Furthermore I would point out to the court that we are interested here in allegations which your Honor has described as serious and which counsel describe as serious, setting forth facts which, if true, constitute violations of provisions of the Securities Act of 1933.

The Court: Oh, I don't quarrel with that. All I want is an affiant or a plaintiff who knows what she says she knew to execute it.

You have got—it is clear from the affidavits here that this woman's son-in-law has some stock, her daughter evidently has some stock; why couldn't those people, one or both of them, have signed this complaint? That a person is ill at the time of the filing of a complaint doesn't say that she can't sign her name.
172 It seems to me that would have been the simple way to do the thing properly.

Mr. Watt: I don't think—

The Court: I am not telling you how to practice law, but I suggest that as a practical matter.

Mr. Watt: I submit that a person who is ill as Mrs. Brilliant has been over a number of years has many

more and legitimate reasons for not coming into court as a party plaintiff.

The Court: You weren't going to bring Mrs. Surowitz to the witness stand, were you, in support of the allegations?

Mr. Watt: There are many cases, your Honor, in which apart from a plaintiff testifying that he or she is a shareholder, the plaintiff has no facts which would be admissible as evidence in a case of this kind.

The Court: Of course that is true. We try many cases where the plaintiff doesn't testify, but where an oath is required and the plaintiff signs an oath, we expect the oath to be an honest one. I don't insist that Mrs. Surowitz would necessarily be brought to the witness stand except as she might have been called as
173 an adverse witness by the defendants.

Mr. Watt: I suggest, then, to your Honor that what that circumstance indicates is that in a case like this, the supposed purpose of Rule 23(b) which is, counsel asserts, to enable them to find out from the plaintiff himself or herself the factual basis for the suit, is clearly inapplicable for this reason: The factual basis for the suit of necessity by reason of the nature of the suit does not rely on Mrs. Surowitzs personal knowledge; it lies on the records filed—

The Court: It does if she swears she has the knowledge, sir.

Mr. Watt: With regard to the things to which she has sworn, she has knowledge.

The Court: We are very jealous of oaths that are taken in this court. I am not tolerant of this sort of thing, and if any reviewing court will tell me that the procedure here, the conduct of the plaintiff and her

counsel here meets the requirements of the law, I will follow what the reviewing court tells me to do. But in the face of this deposition, I can't permit this complaint to stand. I have already ruled on that. We are
174 discussing only these findings.

Mr. Watt: I understand.

* * *

177 The Court: I would have more respect for you if you would start a suit here with somebody who has a Phi Beta Kappa key as a plaintiff and let him make oath to these things instead of heaping it on his uneducated mother-in-law.

Mr. Watt: I will say this, your Honor, since I believe there is a cause of action here: I would be happy to do that, but I also believe that the court should not be closed to the poor and the ignorant, the untutored and virtual illiterate.

The Court: Now did I say I was closing it?

178 Mr. Watt: And I think the virtual effect of this—

The Court: Did I say I was closing the court to the poor who employ two law firms to represent her, your firm and the Altheimer firm? Does that sound like we are closing the door to the poor?

There is no allegation here in the complaint that the plaintiff is poor.

Mr. Watt: The word poor was brought into this matter originally by Mr. Block in describing the plaintiff at one point, but let me return to what I have to say, Your Honor, because then I am sure I have said everything that I can say and I appreciate the opportunity to develop my points fully.

* * *

ADDITIONAL APPENDIX.

Excerpts from Transcript of Proceedings in Trial Court (supplementing excerpts in Supplemental Appendix to Brief of Individual Defendants).

Hearing on February 26, 1964:

* * * * *

Mr. Block:

7 Now, your Honor, on direct examination after intermission, there were some questions and answers put to Mrs. Surowitz and that direct examination came after an intermission of some 15 or 20 minutes. I asked Mrs. Surowitz the following question at page 34, at the bottom of the page:

"Q. At that time—"

—which is the time during the intermission—

"—isn't it correct that they told you that they would ask you these questions about your discussions with Mr. Brilliant?

"A. —"

The Court: Who is Mr. Brilliant?

Mr. Block: Mr. Brilliant, your Honor, is the man that the witness testified was her son-in-law for nine years. She didn't know what he did, although he had been her son-in-law for nine years. But he was the man that brought

8 this complaint to her and she signed.

If there is anything, your Honor, that I think is clear in the law it is that the people who are complaining must be those who make the complaint, not some poor innocent working woman who is brought into this court room, handed

a document, and told to sign it, as is perfectly clear from this.

And, your Honor, there is another additional ground for this, as I say, highly unusual motion, I think.

Mrs. Surowitz' testimony first states under oath—that is one thing she says under oath, that she is the owner and holder of stock of Hilton Hotels Corporation, and I believe that is paragraph 1 of the complaint here. Her testimony is that she bought the stock in 1957, but she doesn't remember anything about it. What she says is:

"I can't tell you. I don't remember."

This is page 6.

"I really don't know. I gave money, I gave him the
9 money, and he invested it, but how he bought it or what he bought, I don't know, I don't remember.

"When you say 'he,' you mean Mr. Brilliant?

"A. Yes."

We have overnight, your Honor gotten from the transfer agent of Hilton Hotels Corporation an affidavit which the plaintiff has not seen that the First National Bank is the transfer agent for Hilton Hotels Corporation and has been such since June 13, 1946. We have reviewed the open and closed ledgers from January 1957 to the present. Incidentally, she said she bought this stock in 1957. The records to the present indicate that Mrs. Dora Surowitz, 1299 Ocean Avenue, Brooklyn, New York, owns 100 shares of Hilton stock. Certificate 100,897, dated October 10, 1963, and that said Dora Surowitz has been a stockholder of record since October 10, 1963.

Now, your Honor, this complaint is one which speaks of wrongs done in 1962 and January 1963. We are not making this motion because Mrs. Surowitz doesn't know every single one of the allegations of the complaint.
10 We make this motion because it is clearly a sham plead-

ing and this Court has inherent jurisdiction to strike a sham pleading. We make it also on the grounds, your Honor, that Mrs. Surowitz does not come before this Court as a proper stockholding party plaintiff.

Thank you.

* * * * * *

11 The Court: Who represents the plaintiff?

Mr. Watt: I do, your Honor.

First, your Honor, let me indicate we received notice of this motion—

The Court: Will you please identify yourself for the record?

Mr. Watt: I am sorry.

Mr. Watt.

We received notice of this motion about 3:30 yesterday afternoon. I think, as Mr. Block correctly states, it is an unusual type of motion. It is obviously not a motion which is one which is granted as a matter of course. We contest it.

The Court: I might say I have allowed motions of this kind before.

Mr. Watt: I understand, but I don't think it is a motion of course. I think it is a contested motion.

The Court: I will let you take all day to reply. Of course the words "of course," as to its being routine,
12 we dismiss cases here right along.

Mr. Watt: All I could say is what Mr. Block characterizes it as unusual, I think that indicates that it is not routine.

* * * * * *

15 The Court: Did you attend at the deposition?

Mr. Watt: I attended at the deposition, yes, sir. Yesterday evening I was working on another matter. As a matter of fact, I was getting ready for a deposition which

was scheduled for 10:00 o'clock this morning. We think we are entitled to file affidavits in opposition to the motions, particularly since the parties defendant have filed an affidavit or asked leave to file an affidavit.

Mr. Block: We haven't asked leave. You are quite wrong. We merely called the attention of the Court to this as a supplemental matter. That is not before the Court. We will rest upon the shamness of this pleading.

Mr. Watt: Then I point out another thing: As
16 far as the deposition is concerned, I don't know whether it has been formally filed or not. As of yesterday when the deposition was taken, we did not waive signature. We have not had an opportunity to review it in the detail in which I think we are entitled to, and to research the law in this matter, which I think we are entitled to, and come into this Court and argue before the Court the issues placed before it by the defendants' motion. We are asking that opportunity at this time.

I frankly say the basis of this point is that of 3:30 yesterday afternoon we received notice and we are not prepared to argue the issues as I believe they should be argued, and which your Honor has said are serious issues. We would like to argue seriously. We would like an opportunity in advance of that occasion to file an affidavit or affidavits in opposition to the motion which I believe we are entitled to do.

* * * * *

17 Mr. Watt: We would like 15 days within which to file opposing affidavits, your Honor, and we will be ready at an appropriate date thereafter to present argument if your Honor wishes it done on the basis of oral argument. We will be prepared.

The Court: How do you know you will be prepared to present argument? I am interested in you as a lawyer and your associates here in this kind of a case—when I see a

thing like this, as this appears to be—and I don't prejudge your client; you represent an out of town client and sometimes a local attorney doesn't have knowledge of the facts which he would have if his client lived here—but you say you will be prepared to argue it. I am just interested in knowing what your argument is going to be in view of what appears to be an accurate transcript here. You
18 concede its authenticity, do you not?

Mr. Watt: Initially I have indicated, your Honor, that I do not question the accuracy of your very competent court reporter, but that it is different from studying a transcript with care. It is different from having an opportunity to review it in association with my colleagues, and it is different from having an opportunity to research the law. There are, I believe, cases in matters similar to this which I believe we are entitled to look to. To ask me to indicate to you—

The Court: Oh, I am not going to—

Mr. Watt: —now what my argument will be is—

The Court: Oh, I am going to give you the time. I think you should recognize that this is an extraordinary or appears to be an extraordinary situation, and I think we should be mindful of that.

Mr. Watt: If your Honor is suggesting I am not going to be prepared to argue seriously, I certainly am going to be prepared to argue seriously. I think in view of the fact that our client is out of the city, and in view of the fact that—

The Court: Wasn't she here yesterday?

Mr. Watt: She was here yesterday. She has re-
19 turned to New York.

The Court: Fifteen days to the plaintiff.

* * * * *

Hearing on March 23, 1964:

• • • • •

Mr. Block: Yes, your Honor. Your Honor gave us leave to file that at the original hearing.

The Court: Do you and other counsel for the defendants or you alone intend to offer the deposition as evidence in support of your motion? And let me tell you the reason for asking the question: Suppose I conclude that there has not been compliance with Rule 23, with the provisions of Rule 23(b) of the Federal Rules of Civil Procedure; still evidence of the failure of the plaintiff to comply would be contained in that deposition.

Mr. Block: That is correct, your Honor.

The Court: For the complaint on its face says that she believed everything in the complaint other than those matters which are stated to be on information and belief.

Now, what is the intention?

Mr. Block: It is, your Honor, to file that deposition, and I hope that our motion—

The Court: Mere filing the deposition under the rule, it seems to me, unless I am mistaken about it—you point it out to me—but the mere filing doesn't bring the testimony officially before the court. All the filing does is to give the parties the right to use the deposition on the trial. Isn't that your motion?

Mr. Block: Well, your Honor, I think that in the case of a motion such as this, it is the same as the affidavits which have been filed by Mr. Rockler and by Mr. Brilliant. They are now part of the motion.

The only question that I thought was raised before your Honor at the first hearing on our motion was that Mr. Watt said he had not had an opportunity to study the questions and answers and was going to raise any questions of inaccuracy, I thought, at the time he filed his affidavit.

The Court: I know that in considering motions for summary judgment, the court may take into consideration all of the depositions on file affidavits and any other
12 documents properly filed. As I went through these papers, I wondered whether on the motion to dismiss—and your primary motion here is one to dismiss—I had a right to take into consideration the deposition of the plaintiff which has been filed of record but not introduced as evidence.

Mr. Block: We would introduce it, then, at this time. As I say, your Honor, I understood that at the time we presented this motion to your Honor—

Mr. Hodson: Page 19, Mr. Block.

Mr. Block: Thank you.

I said at page 19 I would ask leave of court to file the deposition.

"I would ask leave of court to file the deposition of Dora Surowitz subject to whatever corrections Mr. Watt feels should be made after checking with the court reporter's actual notes.

"The Court: The clerk is directed to file the deposition of the plaintiff."

At this time, your Honor, then I would make a for-
13 mal request to have the deposition of Dora Surowitz made a part of the record on our motion as evidence.

The Court: You offer it in evidence?

Mr. Block: Yes.

The Court: Then I suggest that it be marked as—Whom do you represent, the defendant Crown?

Mr. Block: Mr. Crown.

The Court: Mark it as Defendant Crown Exhibit 1 for identification.

Do you join in that?

Mr. Friedman: I join in that motion.

Mr. Hodson: I join in it, too, your Honor.

The Court: Then let it be marked as Defendants' Exhibit 1 for identification.

(Said document was thereupon marked Defendants' Exhibit 1 for identification.)

The Court: Counsel for the plaintiff, is there any objection?

Mr. Watt: There is no objection, your Honr.

The Court: All right. With no objection then, Defendants' Exhibit 1 for identification may be admitted into evidence as Defendants' Exhibit 1.

(Said document, so offered and received in evidence,
14 was marked DEFENDANTS' EXHIBIT 1.)

Mr. Block: Thank you, your Honor.

The deposition of Mrs. Surowitz establishes that the oath is a false oath. I feel only a sense of sorrow in having to say that because I think as the court reads the deposition, and particularly reads the affidavit of Mr. Brilliant, the court will come to the conclusion that this woman was imposed upon. But that does not make any the less grievous, I believe, your Honor, the injustice that has been committed by permitting her to file that false oath. The cases are clear that a palpably false pleading may be stricken, and we suggest that equally a pleading which must be sworn to may be stricken when the oath which necessarily supports it pursuant to the rules is palpably false. The courts have gone so far as to strike defenses where they are palpably false as in a conspiracy case where a group of defendants who are being sued in a civil conspiracy case deny a conspiracy of which they have been convicted criminally and the courts have stricken
15 that denial as palpably false. That is the case of *United States* v. *Greater New York Chamber of Commerce*, which was affirmed at 219 U. S. 293.

There are cases, your Honor, which establish the difference between a plaintiff who has knowledge of his claim

and is subject to being examined on that knowledge but doesn't have knowledge of absolutely every detail of the claim and a plaintiff who is induced by attorneys to file a claim without any knowledge. And it is interesting that the two cases which point up this difference so clearly both involved the same situation and are both found in the same volume of the Federal Rules Decisions. The first of those cases is *Murchison* v. *Kirby*, 27 Federal Rules Decisions at page 14. In that case the defendants moved to strike a complaint or to dismiss a complaint after they had taken 1800 pages of testimony of Mr. Murchison and they moved on the ground that Mr. Murchison didn't know every detail of his complaint. The court said:

"Obviously the facts to support the complaint, par-
16 ticularly the conspiracy count, may come from sources other than the plaintiff."

But the plaintiff, we submit, your Honor, must know those sources and have an understanding of the suit.

And in *Freeman* v. *Kirby*, 27 Federal Rules Decisions at 395, the court dismissed that complaint involving the same situation where an attorney—now this was a case where an attorney had signed the complaint and the court said that the attorney had no knowledge. At pages 398 and 399 of 27 Federal Rules Decisions the court said:

"It is apparent that Holland, the attorney, in his eagerness to be of service, expressed a desire to bring this suit even before he had received Court's Exhibit 1 which was the alleged source of his grounds to support the allegations of the complaint. He apparently felt so offended that he instituted suit in the names of persons whom he had not previously met and al-
17 legedly expended approximately $12,000 in disbursements without any definitive agreement with his client to be made whole. He neither knew who had offered the memorandum or inquired into the truth of the

allegations therein, nor as to matters stated therein to be further developed. If an attorney's signature to a pleading is to be more than a hollow gesture, he must do more than obtain a person willing to lend his name as a plaintiff, especially so where, as here, the complacent plaintiff is without knowledge, is content to act that role without reading the complaint, and expects to be paid for his time. An attorney's certification under such circumstances runs flagrantly afoul of the purpose of the rule."

The Court: You may remember one of your partners was in a case here not unlike the one you just quoted. It dealt with the proposed merger of General Dynamic Corporation with Materials Service Company where some lawyer in New York, I believe it was, or some place in New
18 Jersey selected a Chicago lawyer to file a complaint also on behalf of a woman with a nominal stockholding seeking to induce the court to restrain the merger. And your partner, whoever it was, took the deposition of the lawyer who himself made oath to the complaint, and his deposition was taken because in that case the woman was asserted to be sick, couldn't attend. He admitted under oath that he didn't know his client, that the facts or the allegations to which he had sworn as being true he knew nothing about except as his referring lawyer in New York or Phildelphia, I have forgotten the name of the town, told him they were true.

I dismissed that complaint on the motion of the defendant. An appeal was taken, I think, in that case to our Court of Appeals, but my recollection is—and I am not sure about this—that it was not expeditiously prosecuted, and it was later dismissed.

So we do not have in this circuit an expression by our Court of Appeals precisely on the point. I don't know why

it wasn't prosecuted, but after notice of appeal, I
19 don't think any briefs were filed.

Mr. Block: That is correct, your Honor.

The Court: You are familiar with it?

Mr. Block: Yes, I am. That was Hennessy *vs.* Material Service Corporation.

The Court: You may continue.

Mr. Block: Well, your Honor, as grievous as is the situation where an attorney makes that kind of representation, I feel that even more grievous is the situation here where they have had a totally false affidavit attached to a complaint by this poor and innocent woman, and we get to the point, remarkably enough, of reading in both the affidavit of Mr. Rockler and in the affidavit of Mr. Brilliant which are now made part of this record, that Mr. Brilliant really represents over 2,000 shares of stock of Hilton Hotel and the question immediately arises, "Now why would they pick this poor woman who has no knowledge of anything, this, as they say, uneducated Jewish lady who came from Poland or some Central European country without education other than in Jewish schools and have her make this oath when Mr. Brilliant, who is a graduate of the Harvard Law School, who sent a proxy to the meeting of Hil-
20 ton Hotels Corporation in 1963 in his name—he didn't send that proxy in Mrs. Surowitz' name; he sent that proxy in the name of Irving Brilliant as Trustee—why didn't Mr. Brilliant, who under oath says he represents 2,235 shares, I believe? Why didn't Mr. Brilliant sign this affidavit if it is true that on information and belief he believes these things and that all of these charges that they made as the truth are in fact the truth?

The Court: Well, we must take the complaint as filed. I wonder whether I have any right to inquire into the reasons why the affiant Brilliant didn't make himself a co-plaintiff? Certainly if I were trying this case, it would

become material, but considering the matter on the motions here, I wonder if I have the right to do that?

Mr. Block: I would suggest that, your Honor, only because Mr. Brilliant has filed this affidavit. In other words, trying to sustain a false affidavit, Mr. Brilliant has filed an affidavit which merely emphasizes its falsity. That is
21 why I suggest to this court that it has the right to consider Mr. Brilliant's affidavit.

We did not make it part of this record. Mr. Rockler and Mr. Watt filed it pursuant to their request for fifteen days within which to file affidavits.

But what I point out to this court is that they do not make any affidavits which indicate that Mrs. Surowitz' deposition—I mean Mrs. Surowitz' affidavit is true, but what they do, they file affidavits which seem to suggest that they didn't want to file an affidavit by some responsible and understanding person.

Mr. Brilliant's explanation for the reasons for not signing this himself are, I think, somewhat significant. He says:

> "Mrs. Surowitz stated that she was willing to bring suit and I advised Mr. Rockler of this."

This is at page 5 of Mr. Brilliant's affidavit.

> "I considered joining as a party plaintiff in my capacity as trustee for my minor children or as the person
22 responsible for handling my mother's estate. I also considered and discussed the matter with my wife as to the advisability of my wife joining as the plaintiff. My wife is and has been quite seriously ill for the past seven years and has spent an average of about eight weeks a year in the hospital. Consequently we concluded that she ought not to be named as a party plaintiff. I also determined that I should not sue in a fiduciary capacity because of possible legal complications that might be entailed. Before reaching these con-

clusions, I discussed the facts and circumstances with Mr. Rockler. Later Mr. Rockler sent the formal complaint to me, I read and explained it to Mrs. Surowitz, I told her that the charges in the complaint reflected the investigation and study of Mr. Rockler and myself, and that in my opinion the charges of wrong-doing were soundly based."

Now here is the man who says, "I represented 2,235
23 shares, but I am not going to sign this. I am going to let this poor old lady sign it. But I talked to Mr. Rockler about it and told him that in my opinion the charges of wrong-doing were soundly based."

When Mr. Rockler files an affidavit, he goes through the whole story about how he was approached by Mr. Brilliant and how he sent this document down to be signed. He never says—and I think that this is something for which Mr. Rockler should be complimented—all he says about the signature on this affidavit is:

"Within a few days after the complaint had been mailed to Mr. Brilliant and Mrs. Surowitz, it was returned to affiant with verification executed."

And that is the end.

But he says:

"Counsel and the plaintiff do not in any respect agree to waive and expressly reserve the attorney-client privilege and the confidential and privileged
24 character of counsel's work products."

* * * * *

The Court: I do not have a clear recollection, it is some time since I looked at this complaint, what compliance in your opinion has been made with this requirement of Rule 23(b), and I quote from it:

"The complaint shall also set forth with particu-

larity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for the failure to obtain such action or the reasons for not making such effort."

Mr. Block: There is an attempt to meet the phrase, "the reasons for not attempting to take such action," in paragraph 10 at page 41 of the complaint.

"No demand has been made on defendant corporation to prosecute its remedy for the above-described fraud against the individual defendants since any such demand would be a futile gesture and act by reason of the circumstances pleaded above. The affairs of the defendant corporation are completely dominated and controlled by the officers and directors named as defendants herein, said defendants being the persons who conceived, approved and implemented the above-described illegal and fraudulent scheme, fraud and deceptive acts and practices employed to defraud the defendant corporation and its shareholders. Plaintiff has heretofore protested to the defendant corporation against the gross impropriety of the acts set forth above."

The Court: That allegation, of course, is palpably false in the light of her sworn testimony.

* * * * *

The Court: Richard F. Watt. That is your signature, isn't it, on the complaint?

Mr. Watt: It certainly is, your Honor.

The Court: And then follows the signature of Walter J. Rockler, is that right?

Mr. Watt: That is correct.

The Court: And David R. Kentoff, attorneys for the plaintiff.

May I inquire whether you prepared this complaint?

Mr. Watt: I worked on the complaint, your Honor. I have been working on the matter in conjunction with Mr. Rockler for many, many months.

The Court: Lawyers would say that your answer is not responsive. I ask you, since your signature is on this complaint, you have attached your professional signature to this complaint, and I feel that a lawyer should be
41 very jealous of his professional signature. As a matter of fact, reading some of the—I was going to say legislative history, but the history of the discussions that went on in connection with the framing of these rules, some of the men said in answer to those who said every complaint ought to be sworn to that the mere signature, the professional signature of a lawyer—and I have been contending for this for years—ought to carry with it a great deal of responsibility.

I had occasion to make a speech, and I don't make many—in Indianapolis at the Seventh Circuit Judicial Conference when we were considering the amendments to the civil and criminal rules. I spoke of this Rule 11 and I said I was getting weary, as I am sure many trial judges were, of having lawyers put their professional signatures to allegations, serious allegations in a complaint, and the allegations in this complaint are very serious; that some way ought to be found to insure that the lawyer who puts his professional signature to a complaint honestly believes, based on talks with his client, if you please, that the
42 allegations are true.

Now I ask you again: Did you prepare this complaint?

Mr. Watt: No one individual prepared the complaint in the sense that—

The Court: What part of it did you prepare?

Mr. Watt: I would have to—

The Court: Your signature is first on the complaint and it has 92 pages.

Mr. Watt: Your Honor, the complaint went through a number of drafts in our office. I worked on it, Mr. Kentoff worked on it, Mr. Rockler worked on it.

The Court: You are unable to tell me whose language is contained in this complaint?

Mr. Watt: I would say all three of our language is contained in the complaint, your Honor.

The Court: You say that you, Mr. Rockler and Mr. Kentoff—was that the name of the lawyer?

Mr. Watt: Kentoff.

The Court: Kentoff. Is he a Chicago lawyer?

Mr. Watt: Yes, he is, sir.

The Court: All three, then. You tell me that all three of you prepared this complaint?

Mr. Watt: If your word prepared, your Honor, 43 means that all three of us prepared all of it, the answer obviously is that all three of us did not at every point in time—

The Court: You three assisted in the preparation.

Mr. Watt: The three of us assisted, worked together, collaborated in preparing the complaint.

The Court: Did any other lawyer prepare the complaint or assist in the preparation of it?

Mr. Watt: I don't think so. I think the three of us did the work, sir.

The Court: You mean to say that you, as the first signature on this complaint, do not know whether or not any other lawyer assisted in the preparation of the complaint?

I am not seeking to embarrass you.

Mr. Watt: You are not embarrassing me in the slightest.

The Court: If there is anything here that is going to take you out on this thing, I want to do it.

Mr. Watt: I am not in the slightest bit embarrassed.

The Court: This is my 48th year at the bar and I
44 don't like to be critical of lawyers. To paraphrase an expression, some of my best friends are lawyers. I might go further and say virtually all of my friends are lawyers. I don't ever like to say a hurtful thing to a lawyer, but I think a lawyer whose name appears first on this complaint in his own handwriting, in the light of the deposition of the plaintiff, ought to be able to tell me who prepared the complaint, because the signature is there. The judges have a right to know that the signature on a complaint represents that those are the lawyers who prepared it.

Now you are unable to say—

Mr. Watt: No, I am not unable to say, your Honor. I have advised you that I, Mr. Rockler and Mr. Kentoff collaborated in preparing the complaint.

The Court: Any other lawyers?

Mr. Watt: Whether there were other lawyers in our office who from time to time were conferred with and spoken to, at this point I would not be able to say.

The Court: Will you tell me that the dictation of this complaint was by you and Mr. Rockler and Mr. Kentoff
45 and not by your referring lawyer?

Mr. Watt: It was not done by any lawyer except—lawyer or lawyers except in our office, your Honor.

The Court: To what extent did you rely on information furnished you by your referring lawyer—for example, Mr. Brilliant, whose affidavit is here?

Mr. Watt: Information was transmitted back and forth between Mr. Brilliant and Mr. Rockler, as their affidavits made clear, and we relied on that information to some extent as the affidavits made clear.

The Court: Did you ever meet your client before you prepared this complaint?

Mr. Watt: I did not, sir.

The Court: Did any of your partners or associates ever meet your client before you prepared this complaint?

Mr. Watt: I don't know whether Mr. Rockler met Mrs. Surowitz before or after the complaint was prepared, your Honor.

The Court: Just as a matter of professional interest, do you think a lawyer ought to meet his client before he files a 92-page complaint in the United States District Court
46 making charges against men who bear fine reputations in the community, not only in this community but throughout the country? Do you think you should have talked with your client?

Mr. Watt: In some instances, I would say the answer to that is yes, your Honor. In other instances in which the lawyers do a tremendous amount of investigatory work and checking in order to ascertain the basis for the complaint, and where it is sent to us and where we are collaborating with someone out of the city, who is likewise doing some investigatory work, I would say it is not necessary, your Honor, for us to comply with the requirements of Rule 11, that we first meet with the client. This is the kind of a case in which of necessity the facts are primarily within the knowledge of the defendants, and of which no shareholder, no matter how sophisticated, how learned or how versed in the details of financial transactions, could possibly have all the knowledge.

The Court: Are you telling me when you say the facts are primarily within the knowledge of the defendants, that that is the theory and basis under which you filed
47 this complaint?

Mr. Watt: That is what the courts have repeatedly stated, your Honor, in cases arising under Rule 11, in antitrust conspiracy cases in which problems of this kind have arisen. Of necessity where you have actions taken

by corporate officers and directors, in most instances individual shareholders do not know the details of it.

The Court: How do you learn, how did you get the information to make 92 pages of allegations, some of which, as I read the complaint, may even constitute violations of the criminal features of the Securities and Exchange Acts or other statutes?

Mr. Watt: You do precisely what was done here, your Honor, a great deal of time and effort was devoted to investigation, getting as much information as was available.

The Court: You don't say—the plaintiff doesn't say here that the allegations in the complaint are the basis of an investigation by somebody in a lawyer's office or a son-in-law or a Chicago lawyer. That allegation is not made.

48 Mr. Watt: I don't think it is required that the plaintiff say what her lawyers did in a matter of this kind. The question is whether the lawyers did it, and on the basis of the affidavits that are on file here, I don't think there is any basis whatsoever for disputing the fact that an enormous amount of time and effort and investigation was devoted to the matter before the complaint was filed.

The charges are not made lightly, they are not made on the basis of a cursory investigation. A great deal of information was obtained.

The Court: You don't think it is light to have a plaintiff file a 92-page complaint in the United States District Court under oath and thereafter under oath say she doesn't know a thing about it? You don't think that is doing a thing lightly?

Mr. Watt: I was directing myself at that point, your Honor, as to what the attorneys had done in this instance, because you asked—

The Court: I ask you to answer that question.

Mr. Watt: I will be happy to answer the question.

The Court: I want it in the record, I want your conception of what you think right in those circumstances.

49 Mr. Watt: I think that a plaintiff who is a stockholder is entitled to rely upon such information as is relayed to her by someone with whom she has a close relationship and in whom she has confidence; whether that individual relates to her that he has done some investigating and has conferred with counsel, and counsel have done some investigation, and on the basis of that investigation the individual that is speaking to the plaintiff advises her that he thinks the matter is well founded and does his level best to explain to her what the facts and circumstances are—

* * * * *

67 Mr. Watt: If that person, however untutored, relies on what is told to her by someone in whom she has confidence, and that person tells or informs the plaintiff that, himself, or herself, has done his or her level best to ascertain facts, and relates to the plaintiff what

68 he or she has discovered, then I would say a person could be illiterate and still be justified in relying upon what was told to her, and be in a position in which she could say that she honestly believed certain things.

I do not think that we are at a point at which the courts are open or closed, depending upon whether or not a person has the degree of understanding which it is necessary for counsel to have in many instances, to understand what a complaint is all about, and I think that that is precisely what is indicated in the Murchison case. It is what is indicated in many other cases in which matters of this kind have come up, and in certain kinds of cases which are those in which the party plaintiff necessarily relies in some instances, necessarily relies almost wholly upon counsel.

And here we have an instance in which the woman is

relying not primarily upon counsel, she is relying upon someone in her own family whom she knows over a period of time, and presumably whom she could consider trustworthy and reliable.

I would say the fact that Mr. Brilliant himself owned shares of stock in two different capacities, the fact that his wife owned shares of stock, would be factors and
69 circumstances which would certainly justify Mrs. Surowitz in placing even greater weight on what Mr. Brilliant told her.

* * * * *

Hearing on March 27, 1964:

19 The Court: We are not concerned with the limited education of your client; what we are concerned with here is a lawyer filing in the United States District Court a complaint sworn to by a person who says she doesn't know anything about it, in substance.

Mr. Watt: I want to come to that subject, since it has been brought into this matter by counsel, of the role of plaintiff's attorneys in this matter again. I thought I had covered that in my earlier argument, but I will be happy to reach it again.

Finding paragraph 12 at the bottom of page 5 and the top of page 6, I really can't help but be astounded at the temerity of counsel urging that this indicates that Mrs. Surowitz was in some sense bamboozled by irresponsible and I take it what they regard as unethical counsel in this matter.

Now what is a collusive suit under Rule 23(b)? It seems to me that is the guts of the matter.

A collusive suit under Rule 23(b) is a device whereby
20 a corporation which, because if it files suit in its own name would not be able to take advantage of diversity of citizenship, enters into an arrangement with some stock-

holder who is friendly and willing to go along so that the stockholder brings a derivative suit in a cause of action that belongs to the corporation, and the corporation thereby has the advantage by that kind of collusion of diversity of citizenship which it could not otherwise obtain.

* * * * *

21 Mr. Watt: There is no indication by any document on file in this court that as of the date she verified it she didn't understand certain things. Certain things were explained to her, the complaint was read to her, she subsequently verified it, and there can be no doubt as to those facts.

The Court: You don't think her deposition—

Mr. Watt: Her deposition indicates what was in the woman's mind as of the time her deposition was taken, and certainly not the basis where a woman indicates on question after question that is put to her in legal language that she doesn't understand, she doesn't know, I can't answer you on that—it is certainly not a justifiable conclusion from that that the woman filed something falsely as of the time she verified the complaint. What it indicates is that when she was asked certain questions orally on an oral deposition, her comprehension of those questions was extraordinarly limited.

* * * * *

23 The Court: Did you object to the question?

24 Mr. Watt: I objected to some of the questions, yes.

The Court: All of them?

Mr. Watt: Not to all of them, no, sir. This was not my deposition. There were no—

The Court: You have a right to participate in it.

Mr. Watt: There were no pleadings on file. There were no motions on file at the time.

The Court: There was a complaint on file under a so-called oath. You say no pleadings were on file.

Mr. Watt: No answer or motion of any kind had been filed by the defendant.

The Court: The complaint had 90 pages. What do you call it?

I am disposed to agree with you that it was not a pleading as a matter of law, but it was a so-called pleading.

Mr. Watt: Your Honor, I don't want to get into a dispute about it.

The Court: Don't make misstatements of fact, sir, to me. You say there were no pleadings on file; there was a complaint. If there were no pleadings on file, you wouldn't be in court.

25 Mr. Watt: No pleadings filed by the defendant is what I meant to say.

The Court: Then why don't you say what you mean?

You want me to be impressed with your argument. I don't want you to make such inaccurate statements. That reflects on me to say that I am proceeding here with no pleadings on file.

Mr. Watt: I apologize for misspeaking to the court.

The Court: I accept your apology, but when you stand at that lectern and make statements like that, be careful, please be careful. You should be especially careful in a situation like this, sir.

Mr. Watt: Your Honor, I am especially careful.

The Court: No, you are not, not when you make a statement that there were no pleadings on file.

Mr. Watt: Turning to finding paragraph—Let me just interject with regard to the intervening paragraphs.

As I indicated to the court, almost every one of those 26 paragraphs has to do with questions which were asked on the basis of reading certain allegations of the complaint to the plaintiff, and in almost every instance there was indication by the plaintiff that she did not understand the question. I take it her inability—

The Court: I don't agree with you. She said, "I can't give it to you because I can't explain it to you and I don't know."

How does that say that she didn't understand the question?

Show me one answer in the deposition where she said, "I don't understand the question."

Mr. Watt: "Question: —" page 8—

> "Can you tell us, Mrs. Surowitz, why you did not tender your shares of stock pursuant to the offer which is attached to your complaint?
>
> "A. I don't know. Can you explain to me what you mean? I don't understand what you are talking about.
>
> "Q. Did you understand that there was a solicitation for tender of Hilton Hotels Corporation stock
> 27 made by Hilton Hotels Corporation?
>
> "A. What does it mean, tender? I don't understand the word."

Finding paragraph 24, the last sentence:

> "On advice of counsel she refused to answer any further questions concerning the existence or nature of any arrangements for the payment of legal fees or disbursements in the litigation."

It is quite true I did advise her not to answer. On the basis of my advice, she did not answer. I don't know what significance that has in this matter.

I might say that in giving the advice to my client, I relied upon a decision of your Honor, Foremost Products, Inc. *vs.* Pabst Brewing Company, 15 Rules Decisions 128, which is a 1953 ruling of your Honor's in an antitrust case in which an effort was made by defendant's counsel to question the plaintiff with regard to fee arrangements and all of the discussions between plaintiff and his counsel leading to the filing of the suit.

28 Perhaps that does not now represent the law, I don't know. I regarded it as a proper decision and I acted on the basis of that.

I don't know why there should be now in the findings here something presumably from which an unfavorable inference is to be drawn.

The Court: Are you suggesting that the court omit from findings what really happened? I filed just a matter of a half hour ago a 90-page memorandum in a case. Some of the findings were favorable and some weren't, but I was obligated to make findings.

Mr. Watt: I quite agree, your Honor, but I think the findings must be relevant and germane to the matter before the court. The matter before the court as now phrased by counsel is a motion to dismiss as sham and for filing a false verification. I am at a loss to understand what the matter that I just read to your Honor has to do with either of those motions.

Finding paragraph 28, at the top of page 12.

"At no time did she attempt to state in even the
29 most simple or rudimentary terms the nature of her grievances or the charges made in the complaint."

She indicated as best she could she had a grievance. She said her stock wasn't right and she indicated the dividends had stopped. I submit to you about 99 per cent of shareholders of American corporations held publicly, if their dividends stop, they will have a feeling there is something wrong, particularly if they have been getting dividends over a period of years. I don't think they thereafter have to be able to explain why it stopped or what the internal ramifications of the corporation's activities are so that the plaintiff would understand it. She had a grievance, and her grievance was that certain action had been taken by the corporation. She wrote a letter concerning it. Later the

dividends stopped. I don't think that the plaintiff stockholder has to understand a great deal more than that.

Finding paragraph 29 of the findings of fact:

30 "The failure of Mrs. Surowitz on her deposition to supply any information whatever about the nature of the charges in the complaint or about the basis for her sworn statement that these charges were true or correct or that she believed them to be true and correct was not caused by the use of technical or legal language in the questions or by her failure to understand what was being asked."

I submit that anybody who sat in that deposition and anybody who reads that deposition must come to the conclusion that the woman in many instances simply did not comprehend.

The Court: On the contrary, I think that—you say "anyone." Please don't include me. I think the logical inference is just what that finding asserts.

Mr. Watt: I certainly dispute that we have, in effect, conceded the truth of that finding by the matters that are set out in the sentence beginning in the middle of paragraph 29.

"Plaintiff's counsel, having in effect conceded the
31 truth of the finding—"

I don't concede the propriety of proof of the finding in any respect, and I don't think that anything I have done either in the deposition or subsequently can fairly be interpreted as such concession.

* * * * *

35 Mr. Watt: Furthermore, the affidavits are criticized in finding paragraph 31 because there is nothing set forth with regard to the arrangements concerning the contemplated payment of legal fees and disbursements in

connection with this litigation. There was no motion
36 or matter pending to which that was at all germane.

There was a motion to dismiss as sham. That is a Rule 11 motion. There was a motion to dismiss on the ground she was not a proper party plaintiff. Those were the matters that were pending before the court.

However, counsel now wishes to interpret them. Those were the matters that were filed and were noticed.

The Court: Does that refer to the omission of the plaintiff to comply with the local rule of court?

Mr. Watt: Finding paragraph 31 indicates that the affidavits said nothing or contained no other statements concerning the arrangements concerning the contemplated payment of legal fees and disbursements in connection with this litigation. My response to that is that with regard to the pending motions, there was no requirement that either affidavit say anything with regard to legal fees in this matter.

The Court: Was there a statement filed to comply with that rule?

Mr. Watt: There most certainly was, your Honor,
37 and that is one of the reasons that I object to finding paragraph 35.

The affidavit of Mr. Brilliant discloses that the cost of the action is to be shared by others than plaintiff pursuant to a reasonable understanding. I think that is not again an accurate paraphrase of what Mr. Brilliant's affidavit states.

Passing that, it goes on to say—

The Court: Excuse me, counsel.

Do you have the file, Mr. Clerk?

The Clerk: Yes, your Honor.

(Whereupon the file was handed to the court.)

The Court: I just wanted to read the affidavit of counsel for compliance with Rule 39. I have read it.

Mr. Watt: The last sentence of finding paragraph 35 says:

> "No disclosure of such understanding appears in the exception to the affidavit filed herein pursuant to the requirements of Rule 39 of the Rules of the District Court,"

38 and so forth.

Mr. Brilliant's affidavit, paragraph 10, says:

> "I told Mrs. Surowitz that there would be expenses involved in suing and that since members of the family owned a substantial amount of Hilton stock, it was reasonable to assume that members of the family would be willing to pay a major part of the expenses."

I don't know on the basis of that how it is possible to conclude that there has been a failure to comply with Rule 39 of the rules of this court.

Turning to the conclusions of law, Conclusion 2-A is a conclusion that, in fact, she had no knowledge whatever concerning the allegations of the complaint. I don't see how it is possible to make that conclusion.

The Court: Oh, counsel, I can't believe that a person of your seeming intelligence could say that to me, that you can't see that after reading this deposition. I
39 would think you were not quite that obtuse. You can't mean that.

Mr. Watt: I most certainly do, your Honor.

The Court: You just can't mean that after reading this deposition.

Go ahead.

Mr. Watt: Conclusion paragraph 2-C, I don't think it is possible to reach that conclusion. It is possible to conclude that the information she had was extremely—was not of her own in its origin, that it was transmitted to her by the people, and that she received certain facts from her

son-in-law, and that perhaps she didn't perfectly understand them, that I grant you, but to say that she had no information is to make a finding that Mr. Brilliant's affidavit in which he asserts that he explained certain matters to her is untrue, I don't think on the basis of the record it is possible to conclude that.

Conclusion paragraph 4:

"The purpose of the verification required under Rule 23(b) is to permit defendants to examine plaintiff concerning the factual basis upon which the allegations of the complaint are made before defendants are required to proceed with the extremely costly and burdensome task of discovery in such complex cases."

I submit that is not the purpose of Rule 23, and I don't think there has been any authority cited which would indicate that that is the purpose of Rule 23.

Furthermore I would point out to the court that we are interested here in allegations which your Honor has described as serious and which counsel describe as serious, setting forth facts which, if true, constitute violations of provisions of the Securities Act of 1933.

The Court: Oh, I don't quarrel with that. All I want is an affiant or a plaintiff who knows what she says she knew to execute it.

* * * * *

Mr. Hodson: If the Court please, may I answer the last remark first that Mr. Watt made?

As far as I am concerned, I am sure the court knows my position in this. I represent the corporation. I have always understood and I have researched the law recently on the problem, and I can cite Mr. Watt one case—I can't give him the citation at the moment now—where it is the duty of the attorney representing the corporation to file a motion to strike any sham pleading in a derivative suit of this nature.

Now so far as I am concerned, I have gone through these findings of fact, I have worked over them, I think they are right. There may have been one or two slight words that could be changed, but so far as I am concerned, with a false oath, your Honor, with a false oath on this, this is a sham pleading, and as far as Mr. Watt's statements are concerned, it seems to me that the main thrust of his statements are that these were legal questions. Well, they weren't legal questions at all; they were quotations from the complaint. The plaintiff was asked if she knew anything about them and she said she didn't know anything about them, she didn't understand them. Now why in the world the corporation should be put in a position of retaining counsel, hiring counsel to investigate all of these
50 matters, take all the time, as I said to your Honor the other day, take all of the time of discovery, looking into the corporation's records to see whether this sham pleading states any real basis or has any real basis or not, I fail to see. I think I would fail in my duty if I had not joined in this motion for the corporation.

Thank you, your Honor.

* * * * *

52 The Court: I would ask this question of you, Mr. Block.

Paragraph 30, page 2, reads in part as follows:

"The complaint makes a number of extremely serious charges against all of the directors and certain officers of the Hilton Hotels Corporation, many of whom are men of national reputation and standing in
53 the business community."

Now that is true, I think, nevertheless, there was no evidence of that, and I don't want—since I have been admonished here by counsel for the plaintiff that I am going to be disciplined in some form or other later to have any reviewing court say that I made a finding here that is not

borne out by the evidence. Anyone who keeps abreast of business in this community and in the country generally knows that many of the defendants named here are men of national reputation and standing in the business community, but there was no evidence of that, and I would like to suggest that that be deleted. I am sure your clients won't take offense and you can tell them that I believe it but I can't find it.

And I would like to say that instead of—I know you are going away, but instead of making any interlineations here by hand, I would suggest that you have one of your associates make those minor changes, the one suggested by you and the one suggested by other counsel, and bring them in here Monday morning or sometime during
54 the day Monday and I will sign them.

Mr. Block: I will do that.

The Court: I will return the original and the carbon to you.

Mr. Block: Thank you, your Honor.

Mr. Watt: Just one very minor matter so that I know we have a complete record. The copy of the deposition of Mrs. Surowitz which your Honor gave counsel leave to file in this case and which was filed, I don't know whether it—

The Court: Say that over again.

Mr. Watt: The copy of the deposition of Mrs. Surowitz which has been filed here, I don't know whether that copy has appended to it the letter that Mrs. Surowitz signed dated January 22nd, 1963. I think in order that we have a complete record, either it should be filed in conjunction with that deposition or counsel should file a copy so that it will be part of the court record because it was identified as an exhibit at the deposition.

The Court: My ruling was based on what was argued on and introduced here at the hearing. If there can be a

stipulation nunc pro tunc as of the time we heard this
55 matter that some document be introduced, that will be all right with me. I don't know about the document to which you refer.

Mr. Block: I would like to know exactly what we are talking about, your Honor. Perhaps we can talk about it.

The Court: If you don't know, I certainly don't know.

Mr. Watt: This is my understanding as to the document that was identified.

Mr. Block: What you want is the document which was identified admitted in evidence here as Exhibit No. 1 to include the addition of this as part of that deposition?

Mr. Watt: That is correct.

Mr. Block: I would have no objection to that, none at all, your Honor. I think we have now had Mrs. Brackenbury file the signed copy of the deposition as part of the total court record and this is part of that deposition, so that if Mr. Watt wants to add it—

The Court: That document then may by agreement be appended to Defendants' Exhibit 1.

* * * * *

[fol. 221]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

September Term, 1964 January Session, 1965

No. 14653

DORA SUROWITZ, individually and on behalf of all other similarly situated shareholders of HILTON HOTELS CORPORATION, Plaintiff-Appellant,

v.

HILTON HOTELS CORPORATION, a corporation, CONRAD N. HILTON, ROBERT J. CAVERLY, JOSEPH P. BINNS, SPEARL ELLISON, HENRY CROWN, HORACE C. FLANIGAN, BENNO M. BECHOLD, Y. FRANK FREEMAN, WILLARD W. KEITH, LAWRENCE STERN, SAM D. YOUNG, FRITZ B. BURNS, VERNON HERNDON, HERBERT C. BLUNCK, CHARLES L. FLETCHER, ROBERT A. GROVES, JOSEPH A. HARPER, BARRON HILTON and HILTON CREDIT CORPORATION, a corporation, Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

OPINION—March 11, 1965

Before Castle, Acting Chief Judge, Swygert, Circuit Judge, and Mercer, District Judge.

[fol. 222] MERCER, District Judge. Plaintiff, Dora Surowitz, prosecutes this appeal to review an order of the court below dismissing her complaint in a stockholder's derivative suit.[1]

[1] Our reasons for this conclusory statement in spite of the fact that eight counts of the complaint are based upon the federal securities statutes are hereinafter analyzed.

Plaintiff, the owner of 100 shares of the capital stock of defendant, Hilton Hotels Corporation, filed this suit on behalf of herself and all other shareholders similarly situated praying certain relief against the individual defendants as hereinafter delineated. The defendants named in the complaint are Hilton Hotels Corporation, Hilton Credit Corporation, and certain individuals who are officers and directors of Hilton Hotels.

The complaint charged that the individual defendants had defrauded Hilton Hotels of large sums of money in violation of their fiduciary obligations under state law and in violation of the Securities Act of 1933 and the Securities and Exchange Act of 1934. Such fraudulent acts are alleged to have been done through two transactions. In the first of those transactions it is alleged that the individual defendants, as the officers and directors of Hilton Hotels, caused that corporation to offer to purchase and to purchase 300,000 shares of its own common stock at inflated prices. It is further alleged that over 100,000 of such shares were sold to the corporation by various officers and directors of the corporation.[2] The second transaction alleged is that the individual defendants, as officers and directors of Hilton Hotels, had caused that corporation to offer to purchase and to purchase approximately 1,058,000 shares of Hilton Credit Stock, including over 631,000 shares held by various officers and directors of the Hotels corporation, also at inflated prices.[3] The complaint further charged that Hilton Hotels thus was caused to [fol. 223] expend approximately $12,000,000 of which ap-

[2] Officers and directors who are alleged to have sold such stock and the respective numbers of shares allegedly sold by each are: Conrad N. Hilton, 85,847; Sam D. Young, 353; Vernon Herndon, 1,147; Herbert C. Blunck, 393; Charles L. Fletcher, 4,100; Robert A. Groves, 6,000; and Joseph A. Harper, 2,150.

[3] Officers and directors of Hilton Hotels alleged to have sold such stock and the respective numbers of shares allegedly sold are: Conrad N. Hilton, 375,967; Conrad N. Hilton Foundation, 28,334; Barron Hilton, 126,392; Henry Crown, 70,631; Charles L. Fletcher, 24,100; Robert P. Williford, 14,150; Vernon Herndon, 4,408; and Robert J. Caverly, 464.

proximately $4,800,000 was paid to certain of the officers and directors who are named as defendants.

The theory of the complaint is that the two stock purchase transactions above described had no proper corporate purpose, but that the same were intended by the individual defendants to enable certain of their number, particularly the defendants, Conrad N. Hilton and Henry Crown, and members of the families of those defendants, to sell shares of their stock to the corporation at a higher price than they could have obtained on the market.[4] It further alleged that the individual defendants made or caused to be made numerous false and misleading statements, in that they failed to disclose relevant information to the shareholders of Hilton Hotels related to their own activities in the furtherance of the alleged scheme. It is further alleged that those acts were done at a time when the individual defendants knew, or had reason to know, that the business affairs of Hilton Hotels were in such condition that a substantial drop in the value of the shares of that corporation was imminent.

All letters of transmittal, notices and offers submitted to the shareholders in the two transactions are attached to the complaint as exhibits.

The complaint alleged that the individual defendants, in presenting the offers to purchase the stock above mentioned, concealed from the Corporation and the shareholders thereof the true reasons for making the offers, and that, with respect to both the purchase of the Hilton Hotels shares and the Hilton Credit shares, the individual defendants failed to disclose to the Hotels Corporation and its shareholders that they, the individual defendants, had engaged in activities designed artificially to inflate prices of the subject shares for the purpose of their scheme and plan to profit at the expense of the Hotels Corporation.

[4] The complaint alleged that the individual defendants engaged in manipulative practices which resulted in artificially inflating the market prices of both Hilton Hotels and Hilton Credit shares immediately preceding their issuance of the corporation's offers to purchase such shares.

The complaint was in eleven counts, the first six of which were based upon the transaction for the purchase of the [fol. 224] Hilton Hotels shares. Of those six counts, two of the counts charged certain of the defendants with the violation of the general corporation laws of the State of Delaware, while the other four counts charged all of certain of the individual defendants with the violation of Section 10(b) of the Securities and Exchange Act of 1934,[5] Section 17(a) of the Securities Act of 1933,[6] Section 9(a)(4) and 9(e) of the Securities and Exchange Act of 1934,[7] and Section 12(2) of the Securities Act of 1933.[8]

Of the five counts relating to the transaction for the purchase of shares of Hilton Credit, one count charged certain of the defendants with violation of the general corporation laws of the State of Delaware, while the other four counts charged some, or all, of the individual defendants with the violation of Section 10(b) of the 1934 Act, Section 17(a) of the 1933 Act, Sections 9(a)(4) and 9(e) of the 1934 Act, and Section 12(2) of the 1933 Act.

With respect to the Hotels Corporation stock purchase, the complaint prayed for a judgment against the individual defendants for the damages sustained by the corporation because of their allegedly illegal acts, and that they make restitution to the corporation for its losses. The five counts related to the purchase of Hilton Credit shares prayed for a judgment against the individual defendants for the damages sustained by Hilton Hotels because of that transaction, and that the individual defendants be required to account to the Hotels Corporation for all profits, gains and benefits realized by them as a result of their allegedly illegal acts and breach of their fiduciary duty.

The complaint was signed by certain of plaintiff's attorneys, and was verified by the affidavit of plaintiff. On

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[5] 15 U.S.C. 78j.

[6] 15 U.S.C. 77q.

[7] 15 U.S.C. 78i.

[8] 15 U.S.C. 77l.

that affidavit plaintiff swore that certain of the allegations of the complaint were true. She verified a majority of the allegations of the complaint upon information and belief.

On February 25, 1964, after the complaint was filed, but prior to the filing of any answer thereto, the defen- [fol. 225] dants, pursuant to an order of the court below, took the deposition of plaintiff. At that deposition the defendants' attorneys inquired of the plaintiff as to the basis for swearing that certain of the allegations were true. She replied to those questions that she "did not know" and "did not know anything about it." She was then questioned relative to the factual basis of a number of the specific allegations made on information and belief. In each instance she answered, in effect, that she didn't understand it and couldn't explain it, and that she did not know. Upon the stipulation of counsel, the general question was then asked as to whether plaintiff knew any facts at all upon which she based the allegations made on information and belief, to which she answered, "I don't know. I can't give you no facts because I don't understand it."

She identified her signature on a letter of protest mailed to the corporation over her name, but when shortly thereafter she was asked upon what basis she had alleged that she had made a protest to the corporation of the stock purchase offer, she replied, "I don't know" and "I don't know nothing about it." At one point in the deposition she replied, "I have no information because my son-in-law, [Irving Brilliant] I left it to him, and he was the one that knew all about it."

In response to questions from her own attorney she stated that she had turned the transmittal letter and the offer to purchase Hilton Hotels stock, and other letters relative to that transaction, over to Mr. Brilliant, who had brought the protest letter to her and asked her to sign it and that she had signed it. She further stated that Mr. Brilliant had brought her the complaint and explained it to her whereupon she had signed it. She further stated at one point that Brilliant had said that

"He would like to take action" and that, "He said he would take care of it * * *. I left it to him."

On the same day, following the taking of plaintiff's deposition, the defendants served notice on plaintiff that they would, on the following day, February 26, 1964, move to dismiss the complaint on the ground that it was a sham pleading and on the further ground that the plaintiff, Dora [fol. 226] Surowitz, was not a proper plaintiff.[9] At the hearing on February 26, leave was given to the defendants to file plaintiff's deposition, and plaintiff was given fifteen days to file whatever documents she deemed appropriate in opposition to the motion to dismiss.

Within the fifteen days allowed, plaintiff filed the affidavits of Mr. Brilliant and of Walter J. Rockler, one of plaintiff's attorneys.

The affidavit of Brilliant stated that he had a legal education, but that he worked as a professional investment counselor; that, as of December, 1962, members of his immediate family owned more than 2350 shares of Hilton Hotels common stock; that he had purchased one hundred shares of Hilton Hotels stock for the plaintiff on August 1, 1957; that in December, 1962, plaintiff brought him the papers relating to the offer of Hilton Hotels to buy a part of its own stock, whereupon he informed her that he was studying the matter; that he conferred with Mr. Rockler after which he and Rockler reached the conclusion that the transaction was questionable and should be objected to; that Mr. Rockler prepared a letter of protest which plaintiff signed after the nature of its contents was explained to her by Brilliant; that he conducted investigations and research into the transaction and communicated with Mr. Rockler with respect thereto; that Hilton Hotels stock declined in market price in 1963 and the corporation passed the 1963 dividend; that plaintiff asked him about that, whereupon he told her that Rockler was of the opinion that the officers

[9] The latter ground, based upon the contention that plaintiff was not a shareholder contemporaneously with the transactions of which complaint is made, is obviously ill founded and was apparently abandoned by defendants in the court below.

and directors of the corporation had engaged in wrongful conduct and it might be wise to bring suit; that plaintiff then stated that she was willing to sue; that he received the complaint from Mr. Rockler, which he read and explained to plaintiff, and that he informed her that the charges contained in the complaint reflected the investigation made by himself and Rockler and that the same were soundly based; and that thereupon plaintiff signed and verified the complaint.

[fol. 227] The affidavit of Mr. Rockler described in some detail the investigations undertaken by him and other attorneys working with him which led to his knowledge that the positive allegations of fact of the complaint were true, and that he had gained information upon which he believed that all other allegations of the complaint were true and well founded.

After argument upon defendants' motion to dismiss, and after reviewing plaintiff's deposition and the affidavits submitted to him, the trial judge entered an order on March 30, 1964, striking plaintiff's complaint.

In his memorandum order striking the complaint, the trial court found that the verification of plaintiff was false inasmuch as her deposition revealed that she had no knowledge of the facts which she had therein sworn to be true, and that she had lacked any information to support her verification on information and belief of the acts of misconduct and wrongdoing alleged in the complaint. The court therefore held that the verification of the complaint was a nullity and inconsistent with the verification requirements of Rule 23(b).[10] The court concluded that, in

[10] In pertinent part, Rule 23(b) provides:

"In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and shall aver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains * * * and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The

the absence of a motion for leave to substitute any other verification or to file an amended complaint, the suit must be dismissed. The court further held that the plaintiff's attorneys who had signed the complaint violated Rule 39 of the District Court for the Northern District of Illinois in that they had filed affidavits falsely stating that they knew of no agreement for the sharing of costs or the payment of plaintiff's expenses in this suit, as shown by a comparison of such affidavits with the statement contained in the Brilliant affidavit that certain members of his family had undertaken and would undertake to pay the major part of the costs and expenses of the plaintiff's suit.

[fol. 228] This appeal is prosecuted to review that decision.

The last ground mentioned upon which the complaint was dismissed can be quickly disposed of. There is nothing in the Brilliant affidavit which indicates that Mr. Rockler or any other of plaintiff's attorneys were advised at the time when their Rule 39 affidavits were filed that Brilliant and other members of his family had agreed to bear a large part of the burden of expense connection with this suit.[11] There is thus absent any evidence that any of the three affidavits by plaintiff's attorneys stating that each knew of no payment or promise of payment of expenses was a false statement by any of the three attorneys. So far as the order of dismissal rests upon the deter-

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complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees * * * such action as he desires * * * ." F.R.C.P. 23(b), 28 U.S.C.A.

[11] The only relevant statement contained in the Brilliant affidavit is the following narrative of a conversation not in the presence of any of the attorneys:

"I told Mrs. Surowitz that there would be expenses involved in suing and that, since members of the family owned a substantial amount of Hilton stock it was reasonable to assume that the members of the family would be willing to pay a major part of the expenses."

mination that the attorneys had violated Rule 39 of the court below, such a finding is wholly without evidentiary support and is clearly erroneous. To the extent that the decision rests upon that finding, the record before us does not sustain it.

The determinative issue of this appeal deals with the proper interpretation of the provision of Rule 23(b) which requires that a complaint in a derivative cause of action must be verified.[12]

Before approaching that issue, we will first consider plaintiff's argument that Rule 23(b) could not be applied to this complaint inasmuch as eight of its eleven counts are based upon the federal securities acts. Thus the plaintiff argues, as to those eight counts, that the complaint cannot properly be construed as derivative because federal law is the jurisdictional basis thereof.

We certainly agree with the plaintiff's thesis that the policy of the federal securities laws is to protect investors, including the uninformed, the ignorant, and the gullible. However, the statement of that thesis begs the question which is here presented. We think it clear from an examination of the sections of the securities laws upon which [fol. 229] the complaint is founded, in the light of the allegations of the complaint itself, that the counts of the complaint which are based upon federal law are wholly derivative.

Section 12 of the Securities Act of 1933, 15 U.S.C. 77l, provides, in pertinent part, that any person who offers or sells a security in violation of certain provisions of the act "shall be liable to the person purchasing such security from him."[13] The cause of action created by that section accrues only to the purchaser of securities sold in violation thereof. *Slavin* v. *Germantown Fire Ins. Co.*,

[12] Note 10, supra.

[13] "Any person who [offers or sells a security in violation of certain provisions of this title] shall be liable to the person purchasing such security from him, who may sue * * * to recover the consideration paid for such security with interest thereon * * * upon the tender of such security, * * *." 15 U.S.C. 77l.

3 Cir., 174 F. 2d 799; *Cf., MacClain* v. *Bules,* 8 Cir., 275 F. 2d 431.

Section 9 of the Securities and Exchange Act of 1934, 15 U.S.C., 78i, provides that a person who purchases or sells a security, the price of which was affected by certain manipulative practices proscribed by that section may recover damages from any person who willfully participated in such manipulative practices.[14]

Thus Section 9 of the 1934 Act, like Section 12 of the 1933 Act, creates a cause of action which accrues only to a purchaser or seller of securities, the price of which is affected by the manipulative practices therein proscribed.

Hilton Hotels, not plaintiff, is alleged to be the purchaser of the securities involved in this suit. It affirmatively appears that plaintiff did not sell any of the securities involved. Plaintiff is, therefore, without any personal right of action under either of those sections. Her interest is [fol. 230] secondary and derivative, and the right alleged is the right of the corporation.

Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. 78j, and Section 17(a) of the Securities Act of 1933, 15 U.S.C. 77q, each declare certain conduct to be unlawful without specifically authorizing actions for damages thereunder.[15] It has been held that civil liability

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[14] Section 9 declares unlawful, among other acts, any act or practice done with a design to create an appearance of active trading of a security or to raise or depress the price of such security for the purpose of inducing the purchase or sale of such security by others. The section then provides, in part:

"(e) Any person who willfully participates in any act or transaction in violation [of this section], shall be liable to any person who shall purchase or sell any security at a price which was affected by such act or transaction, and the person so injured may sue * * * to recover the damages sustained as a result of any such act or transaction. * * *." 15 U.S.C. 78i.

[15] Section 10 of the 1934 Act provides, in part:

"It shall be unlawful for any person, * * * , by the use of any means or instrumentality of interstate commerce or of the mails, * * *—

(footnote continued on next page)

under each of those sections is implied by the language which makes the proscribed conduct unlawful. *Pfeffer* v. *Cressaty*, S.D. N.Y., 223 F. Supp. 756, and *Osborne* v. *Mallory*, S.D. N.Y., 86 F. Supp. 869; *Cf.*, *Texas Continental Life Ins. Co.* v. *Bankers Bond Co.*, W.D. Ky., 187 F. Supp. 14; Compare, *Trussell* v. *United Underwriters, Ltd.*, D. Colo. 228 F. Supp. 757, all interpreting Section 17 of the 1933 Act; *E.g.*, *Ellis* v. *Carter*, 9 Cir., 291 F. 2d 270, *Matheson* v. *Armbrust*, 9 Cir., 284 F. 2d 670, cert. denied 365 U.S. 870, *Hooper* v. *Mountain States Securities Corp.*, 5 Cir., 282 F. 2d 195, cert. denied 365 U.S. 814, and *Fischman* v. *Raytheon Mfg. Co.*, 2 Cir., 188 F. 2d 783, applying Section 10(b) of the 1934 Act.

Where it has appeared that a corporation was the party injured by a violation of Section 10(b) of the 1934 Act, the courts have held that a shareholder of that corporation had standing to sue only on a derivative basis. *Birnbaum* v. *Newport Steel Corp.*, 2 Cir., 193 F. 2d 461, cert. [fol. 231] denied 343 U.S. 956; *Slavin* v. *Germantown Fire*

"(a) • • • •

"(b) To use or employ, in connection with the purchase or sale of any security • • • any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. 78j.

Section 17 of the 1933 Act provides in pertinent part:

"(a) It shall be unlawful for any person in the offer or sale of any securities by the use of any means or instruments of transportation or communication in interstate commerce or by the use of the mails, directly or indirectly—

"(1) to employ any device, scheme, or artifice to defraud, or

"(2) to obtain money or property by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

"(3) to engage in any transaction, practice or course of business which operates or would operate as a fraud or deceit upon the purchaser." 15 U.S.C. 77q(a).

Ins. Co., 3 Cir., 174 F. 2d 799, 805-806; *Kremer* v. *Selheimer*, E.D. Pa., 215 F. Supp. 549, 552.

Though we have found no authority treating this precise question under the provisions of Section 17(a) of the 1933 Act, the plain language of that Section convinces us that any cause of action arising under that Section is a right of the person injured by the acts and practices therein proscribed. When injury is alleged to have been incurred by a corporation, its shareholders can prosecute a suit only upon a derivative basis.

Assuming that each of the eight counts of this complaint based upon the federal statutes states a cause of action, each cause is that of Hilton Hotels, not a cause personal to plaintiff. Her interest and her right to file a suit are clearly secondary and derivative.

Gottesman v. *General Motors Corp.*, S.D. N.Y., 28 F.R.D. 325, is not in point, but is of interest upon this question. The complaint in that case was a shareholder's derivative suit based upon a claim of alleged violation of the federal anti-trust laws. There it was argued that the provision of Rule 23(b) which requires that a plaintiff have been a shareholder at the time of the injury of which he complained could not be applied because the cause of action involved a federal question. That argument was rejected, the court saying that Rule 23(b) must be applied to a derivative suit whether jurisdiction of the court be based upon a federal question or upon diversity of citizenship.

Plaintiff's historical argument, that Rule 23(b) was designed only to prevent the creation of federal jurisdiction by collusion, is not persuasive. That rule is also designed to prohibit speculation in litigation and to protect the integrity of the invaluable instrument of a derivative suit. *Cf.*, *Gottesman* v. *General Motors Corp.*, 28 F.R.D. 325, 326. Although such a suit does have secondary value to a shareholder plaintiff in the protection of the financial integrity of his investment in a corporation, the necessity for the contemporaneous protection of the corporation itself [fol. 232] and of its officers and directors from ill-conceived, nuisance-value litigation is, at least, a consideration of equal

value. *Cf., Pioche Mines Consolidated, Inc.* v. *Dolman*, 9 Cir., 333 F. 2d 257, 265.

The cases cited by plaintiff, arising under Section 16(b) of the Securities and Exchange Act of 1934,[16] are wholly inapposite.[17] Those cases simply held that the contemporaneous ownership requirement of Rule 23(b) is not applicable to such litigation because of the express authorization contained in Section 16(b) for a suit by "the holder of any security."

Plaintiff's reliance upon *Borak* v. *J. I. Case*, 7 Cir., 317 F. 2d 838, aff'd. 84 S. Ct. 1555, is likewise wholly misplaced. In that case we dealt only with the application of the Wisconsin security for expense statutes to a cause of action arising under the provisions of the Securities and Exchange Act.[18] No question under Rule 23(b) was presented.

We conclude that the principal issue presented upon this appeal is not affected by the fact that eight of the eleven counts rely upon federal law as a jurisdictional basis. Plaintiff's suit is derivative and is governed by the provisions of Rule 23(b).

The crucial issue presented by this appeal, namely, the interpretation of the verification requirement of Rule 23(b), is without guiding precedent. It is also an issue which opens the door to sophistries of argument, some of which tend more to cloud the issue than to elucidate it. In the portion of our opinion which follows, we have sought to avoid the invitation extended by the briefs to fish in the dark waters of speculation and have applied our best judgment to the decision of a close question of law.

We reject plaintiff's initial argument that the record before this court cannot support the finding that she was [fol. 233] without relevant knowledge when she verified the

[16] 15 U.S.C. 78p.

[17] *Dottenheim* v. *Murchison*, 5 Cir., 227 F. 2d 737, cert. denied 351 U.S. 919; *Blau* v. *Mission Corp.*, 2 Cir., 212 F. 2d 77, cert. denied 347 U.S. 1016; *Pellegrino* v. *Nesbit*, 9 Cir., 203 F. 2d 463; *Benisch* v. *Cameron*, S.D. N.Y., 81 F. Supp. 882.

[18] That suit involved the provisions of 15 U.S.C. 78n(a) and 78 aa.

complaint because the questions upon the deposition related to the plaintiff's knowledge on February 25, 1964, not to her knowledge approximately two and one-half months previously when she had verified the complaint.

We would agree that plaintiff's argument has verity insofar as the questions asked upon deposition related to technical, evidentiary facts bearing upon the allegations of the complaint. In most cases, the plaintiff in a shareholders derivative suit is merely the instrument for bringing the suit to the court. By hypothesis, most such plaintiffs would lack first-hand knowledge of alleged facts dealing with the intricacies of corporate finance. Most of them, also, would have to rely upon the opinions and advice of trained counsellors for many of the principal allegations of such a complaint.

Reading the deposition most favorably to plaintiff, there is no question that she stated as positive fact essentially four things. These are that she was an owner of Hilton Hotels stock, that the stock missed a dividend, that she thought that her stock was not right, and that she had consulted Mr. Brilliant relative to the meaning of the written offer submitted to her for the purchase of a number of Hilton Hotels shares. In the same light, no one can successfully refute plaintiff's positive statements that she did not know who the individual defendants were, that she did not know of any wrongful acts which they had done, that she did not know of any facts upon which she had alleged that the individual defendants had caused the purchase offers to be made, that she knew nothing about any protest which she had made to the corporation, except for the fact that she had signed a letter shown to her, and that she did not understand the factual basis of her complaint.

It appears from the record that plaintiff is an immigrant woman who works as a seamstress and who has a limited education. It also appears that she has a very limited capacity for reading the English language. From such apparent facts, it must then be concluded that plaintiff is among the most unsophisticated of investors.

We think a sensible interpretation of the verification requirements of Rule 23(b), in the light of the realities

[fol. 234] of litigation of this nature, must relieve the plaintiff after two and one-half months from the necessity of recalling technical factual information which she received from trusted advisors and upon which she acted pursuant to their advice. On the other hand, we find it inconceivable that the instigator of a suit of this nature could fail to know the identity of the individual defendants as directors and officers of the corporation and to know in a general sense what wrongful acts she conceived to have been done which formed the whole supporting skeleton for the suit which she has filed. We think that the deposition of plaintiff evidences one crucial fact, namely, that she evidenced such complete lack of knowledge, understanding or information with relation to the suit which she had filed that the deposition demonstrates without cavil that she completely lacked any knowledge of the basis of the complaint at the time when she signed the same and swore to the verity thereof.

We can only conclude, as did the court below, that plaintiff's verification of the complaint was false because she swore to the verity of alleged facts of which she was wholly ignorant.

It has been held in the context of the bankruptcy statutes that there was no verification of a petition because it appeared upon a trial of the case that the petitioners had no knowledge of any of the acts of bankruptcy which they had alleged in their petition under oath. *In re Frank,* E.D. Pa., 234 Fed. 665, aff'd 3 Cir., 239 Fed. 709. We think the same principle applies under the provision of Rule 23(b).

Rule 23(b) is one of the few instances in which the federal rules require verification of pleadings. We think that that provision requires something more than the mere formality of recklessly swearing to the truth of matters not known. The derivative suit is a unique vehicle of litigation. The holder of one share of stock who is disgruntled at some act of a corporation can, by this device, embroil the corporation and its officers and directors in protracted litigation. We think the verification requirement is designed to compel a plaintiff to begin such a suit with sufficient knowl-

[fol. 235] edge of facts and information to show by his verification that there is a substantial basis to support the complaint which he makes.

As we have indicated, we conceive that all but the most sophisticated investors must rely upon attorneys, or other advisors to supply a substantial part of the information upon which any such complaint rests. We think that the Rule would be satisfied by a verification of intricate factual and conclusory allegations in reliance upon such advice and information. But if the verification provision of the Rule is to have any real meaning, it requires that a plaintiff must have knowledge of his own position and relationship to the suit, of the official identity of the parties against whom the suit is brought and general knowledge of the wrongful acts which he alleges as a foundation for his complaint.[19]

There can be no question that that minimal requirement was not satisfied in this case. On the contrary, it affirmatively appears that plaintiff merely loaned her name to a suit which others desired to file, though she had no idea what the suit was all about. We must conclude that there was, in fact, no verification of this complaint.

That conclusion cannot be altered by the fact that many of the material allegations of the complaint are obviously true and cannot be refuted. Nor can it be altered by the fact that plaintiff is a person having little education and, quite apparently, wholly lacking in sophistication in financial matters. Those limitations can't apologize for her affirmative statements, for example, that she knew of no facts upon which she alleged that the individual defendants

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[19] Plaintiff argues that ample assurance against a frivolous suit is found in the requirement of Rule 11, F.R.C.P., 28 U.S.C.A., that an attorney certify by his signature to a complaint that it rests upon a sound basis. Adoption of that argument would emasculate Rule 23(b). We must assume that the drafters of Rule 23(b) intended something more than a mere semantic exercise in the drafting of its provisions. Had they intended the certification provision of Rule 11 to supersede the verification provision of Rule 23(b), we think that the latter provision would have been omitted. We think the intent was to impose a condition of added assurance in the narrow field to which 23(b) applies.

had caused the stock purchase offers to be made, and that she did not know why she had alleged that those defendants [fol. 236] had committed any of the unlawful acts alleged. These things she must have known to give legitimacy to the serious charges made against those individuals.

Neither *Murchison* v. *Kirby*, S.D. N.Y., 27 F.R.D. 14, nor *Freeman* v. *Kirby*, S.D. N.Y., 27 F.R.D. 395, which are cited by plaintiff, has any conceivable bearing upon the issue before us. Both of those cases arose under Rule 11, F.R.C.P., 28 U.S.C.A., and neither involved any question of the interpretation of Rule 23(b).[20]

No questions of fact were presented by the Brilliant and Rockler affidavits. Those affidavits reveal that substantial and diligent investigation by Brilliant, Rockler and others preceded the filing of this complaint. They would, in our opinion, completely refute the merit of any motion under Rule 11 directed against this complaint. Neither affidavit, however, does anything, if anything could be done, to offset plaintiff's positive disavowal of any relevant

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[20] Because Murchison had stated, in answer to certain questions upon his 1800 page deposition, that he had no personal knowledge of certain of the facts alleged in his verified complaint, the defendants in a derivative suit moved to strike the complaint as a sham pleading because Murchison's attorneys had permitted him to verify facts of which he had no personal knowledge. It was not contended that Murchison lacked knowledge of the basic facts as to the official identity of the defendants and the theory of his cause of action. He stated upon his deposition that he had relied upon information supplied by his retained attorneys in verifying the truth of certain material allegations. The court denied the motion to strike, saying that it was not necessary for a plaintiff to have direct knowledge of all evidentiary details where it appears that his verification rests upon information supplied by attorneys expressly authorized to file the complaint. *Murchison* v. *Kirby*, S.D. N.Y., 27 F.R.D. 14, 18, 19, n. 10, n. 11. See also *Hoover* v. *Allen*, S.D. N.Y., 180 F. Supp. 263, 265.

A complaint based largely upon an attorney's copying part of the Murchison complaint, and filed in the name of a plaintiff who agreed "to lend his name" to the suit was stricken as sham in *Freeman* v. *Kirby*, S.D. N.Y., 27 F.R.D. 395, 398. The court held that there was proof that the attorney was without any information upon which he could certify under Rule 11 that the complaint stated a good cause of action.

knowledge or information other than the fact of her stock ownership.

Brilliant does state in his affidavit that he read the complaint to plaintiff before she signed it, but it seems obvious from her deposition that she had no conception of the matters read. If the contention was that this was a sham [fol. 237] pleading in the sense that it was without arguable foundation, these affidavits would, in our opinion, have a controlling bearing upon the disposition of the defendant's motion. A pleading may, however, be sham in respects other than the lack of an arguable foundation to sustain it. We think the court below correctly held that a pleading governed by Rule 23(b) is sham when it clearly appears that the ostensible verification is a mere formality without knowledgeable or informative comprehension in the party plaintiff whose verification gives it the breath of life. That breath is not instilled by the reading of words to that plaintiff which she obviously did not understand.

The question whether the Rockler affidavit may serve as a verification for this complaint is not before us. There was no motion for a substituted verification in the court below and no submission of any amendment to the complaint. We express no opinion upon the question whether verification of a stockholder derivative complaint by attorney would satisfy the requirements of Rule 23(b).[21]

The court below had inherent power to dismiss this complaint because of plaintiff's non-compliance with the Rule. Rule 41(b), F.R.C.P., 28 U.S.C.A.; *Johnson* v. *Brandon Corp.*, 4 Cir., 183 F. 2d 444; *Cf., Meeker* v. *Rizley*, 10 Cir., 324 F. 2d 269, 271.

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[21] Where the foundation for a derivative complaint was based upon knowledge gained by plaintiff's attorney through his participation in proceedings for the dissolution of a corporation under the New York corporation laws, one court held that verification of such complaint by attorney satisfied the verification requirements of Rule 23(b). *Bosc* v. *39 Broadway, Inc.*, S.D. N.Y., 80 F. Supp. 825. To some extent, the court relied upon a New York procedural rule which permitted pleadings to be verified by attorney if the client resided in a county other than that in which the attorney's office was located.

We have considered all arguments advanced by the plaintiff. We have considered the record in the light of plaintiff's limited grasp of the English language and the intricacies of corporate finance. We have considered the peculiar position of a plaintiff in a suit such as this as, principally, the instrument through which the judicial machinery is set in motion. It is not unreasonable to state as a minimum requirement that the plaintiff have general [fol. 238] knowledge of the acts of which she complains and the connection of the defendants to those acts which she alleges. We conclude that any lesser requirement would make the verification provision farcical.

Judgment Affirmed.

[fol. 239]

IN THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 14653

DORA SUROWITZ, individually and on behalf of all other similarly situated shareholders of HILTON HOTELS CORPORATION, Plaintiff-Appellant,

vs.

HILTON HOTELS CORPORATION, a corporation, et al., Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Before Hon. Latham Castle, Acting Chief Judge, Hon. Luther M. Swygert, Circuit Judge, Hon. Frederick O. Mercer, District Judge.

JUDGMENT—March 11, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the North-

ern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, with costs, in accordance with the opinion of this Court filed this day.

[fol. 240] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 241]

SUPREME COURT OF THE UNITED STATES

No. 161, October Term, 1965

DORA SUROWITZ, etc., Petitioner,

v.

HILTON HOTELS CORPORATION, et al.

ORDER ALLOWING CERTIORARI—October 11, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

The Chief Justice took no part in the consideration or decision of this petition.